FILED
SEP 14 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 432

EINSON-FREEMAN CO., INC.,

Petitioner,

v.

WALTER E. CORWIN, individually and as former Collector of Internal Revenue, and ALMON G. RASQUIN, individually and as Collector of Internal Revenue,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL GORDON JUDGE,
Attorney for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Petition for Certiorari	1
Opinions Below	2
Jurisdiction	2
Statement	2
The Question Involved	3
Reasons for Granting the Writ	3
Conclusion	4
Brief in Support of Petition	5
Statement of Facts	5
Argument:	
The First Ground	7
The Second Ground	10
The Third Ground	12
Conclusion	14
Appendix	15
Statutes	15
Rulings and Regulations	17

TABLE OF CASES:

B. Altman v. *U. S.*, 40 F. (2d) 781 ..... 8, 10
Aronson v. *White*, 87 F. (2d) 272 ..... 6, 13
Pacific Mills v. *Nichols*, 72 F. (2d) 103 ..... 4, 7, 8, 9, 10
Untermeyer v. *Bowers*, 79 F. (2d) 9 10
White v. *Aronson*, 302 U. S. 16 ..... 3, 6

STATUTES, RULINGS AND REGULATIONS:

PAGE

Federal Rules of Civil Procedure, Rule 52.....4, 13, 18

Judicial Code, §240 (a)..... 2

L. O. 1116.....10, 17

Revised Statutes, §3226.....4, 6, 10, 12, 15
Revised Statutes, §3228.....10, 11, 16
Revenue Act of 1932, §609.....2, 5, 15

S. T. 567.....5, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

EINSON-FREEMAN CO., INC.,

Petitioner,

v.

WALTER E. CORWIN, individually and as former Collector of Internal Revenue, and ALMON G. RASQUIN, individually and as Collector of Internal Revenue,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Einson-Freeman Co., Inc., respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to the Circuit Court of Appeals, Second Circuit, to review the decision of that Court which reversed the judgment for your petitioner, the plaintiff below, by the United States District Court for the Eastern District of New York.

Opinions Below.

The opinion of the District Court (R. 68) is reported in 29 F. Supp. 98. The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 112 F. (2d) 683.

Jurisdiction.

The mandate of the Circuit Court of Appeals was entered June 17, 1940. The case arose under the Internal Revenue Laws; the jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938; 28 U. S. C. A. 347.

Statement.

The petitioner, the taxpayer, started suit on January 10, 1939 (R. 1) against Walter E. Corwin, individually and as former Collector of Internal Revenue, and Almon G. Rasquin, individually and as Collector of Internal Revenue, to recover manufacturer's excise tax and interest thereon, assessed against the petitioner and paid to the defendants under Section 609 of the Revenue Act of 1932, amounting to $11,643.88 and $8,141.72, respectively (R. 3-9). Judgment was entered in favor of the petitioner on October 30, 1939, against the defendants respectively, for the sums of $10,830.98 and interest, and $7,216.78 and interest and costs (R. 92, 93). Pursuant to the Mandate of the Circuit Court, an order was entered on August 2, 1940, reversing said judgment, and dismissing the complaint.

The tax sought to be recovered was assessed against and paid by the petitioner during the period from February 27, 1933, to December 29, 1933, as a manufacturer's excise tax on sales of jig-saw puzzles (R. 9). On February 4, 1937, the petitioner filed a claim for refund, the claim relied upon in the complaint (R. 6). This claim was disallowed on August 4, 1937 (R. 56). The defendants in their answer set up the statute of limitations as a complete defense, based upon the filing of a prior claim for refund on January 15, 1935, its disallowance on August 13, 1935, and the fact that petitioner did not start this action within two years after the mailing of the notice of disallowance of the said claim (R. 10-12). The defendants conceded that the tax was illegally collected under the decision of this Court in *White* v. *Aronson*, 302 U. S. 16 (R. 69).

The Question Involved.

The question involved is whether this action is timely if commenced within two years after the disallowance of a claim for refund but more than two years after the disallowance of a prior claim for refund. The District Court concluded that this action was timely (R. 81). The Circuit Court held that the suit was barred by limitations. Corollary to the principal question are the further questions (a) whether the two refund claims were filed on the same grounds, and (b) if they were filed on the same grounds, whether there is any prohibition against a taxpayer's filing two or more refund claims pertaining to the same tax on the same grounds.

Reasons for Granting the Writ.

1. The mandate of the Circuit Court, Second Circuit in this case is in direct conflict with the decision

of the Circuit Court, First Circuit in the case of *Pacific Mills* v. *Nichols*, 72 F. (2d) 103.

2. The case involves an important question of federal law which has not been, but should be, settled by this Court.

3. The Circuit Court departed from the accepted and usual course of judicial proceeding in that:

(a) The Circuit Court based its decision in part upon a portion of R. S. 3226, as amended by §807, Rev. Act of 1936 (26 U. S. C. A. Int. Rev. Code §3772) which is inapplicable;

(b) The Circuit Court completely disregarded a finding of fact made by the District Court, in violation of Rule 52 of the Federal Rules of Civil Procedure.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the mandate of the Court below and that your petitioner may have such other and further relief as the ends of justice may require.

Respectfully submitted,

Daniel Gordon Judge,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Statement of Facts.

In 1932, the petitioner was in the business of producing window displays and other advertising material (R. 32). In that year it started the production and sale of jig-saw puzzles (R. 31). On June 21, 1932, Section 609 of the Revenue Act of 1932 (Appendix, p. 15) became effective (R. 27). On November 14, 1932, the Treasury Department adopted a ruling, S. T. 567 (Appendix, p. 17) to the effect that jig-saw puzzles were subject to the 10 per cent. tax imposed by that section (R. 23). In January, 1933, the petitioner was advised by a Deputy Collector that jig-saw puzzles were subject to the tax (R. 62). During the period between February 27, 1933, and December 29, 1933, the petitioner paid taxes on jig-saw puzzles to the defendant Corwin, amounting to $13,-792.26, and to the defendant Rasquin, amounting to $9,331.00 and interest (R. 9).

On January 15, 1935, petitioner filed with the Collector of Internal Revenue, a certain claim for refund of manufacturer's excise tax paid from January, 1933, to December, 1933 (Deft.'s Ex. "A" in Evidence, R. 57; Offered in Evidence, R. 40). The claim did not specify the amount claimed, and stated that the claim was filed in order to prevent the tolling of the statute of limitations. It set out the fact that the ruling of the Commissioner of Internal Revenue to the effect that jig-saw puzzles are other than children's games is contrary to fact and law; that the puzzles were not games and if conceded to be games were in all instances children's games. It then proceeded to state facts to support the contention that

jig-saw puzzles were not games. This claim for refund was disallowed by letter of August 13, 1935 (Deft.'s Ex. "B" in Evidence, R. 58; Offered in Evidence, R. 40). The reasons stated are that jig-saw puzzles are games, and that jig-saw puzzles containing more than 50 pieces are not children's games.

There the matter rested until February 4, 1937, when the petitioner filed a claim for refund, the one now relied upon (Pltff.'s Ex. "4" in Evidence, R. 53 offered in Evidence, R. 36). This claim asserted that a jig-saw puzzle was not a game and that

> "Taxpayer further relies on the decision rendered for the Appellant in the case of *Philip J. Aronson, Trustee, Plaintiff, Appellant* v. *Thomas W. White, individually and as Former Collector of Internal Revenue, Defendant, Appellee* (U. S. Circuit Court of Appeals for the First Circuit, No. 3171, January 5, 1937) wherein it was held that a jigsaw puzzle was not taxable under Section 609 of the Revenue Act of 1932."

This claim, considered on the merits, was disallowed on August 4, 1937, for the sole reason that this Court had granted certiorari in the *Aronson* case (301 U. S. 675). (Pltff.'s Ex. "6" in Evidence, R. 56). On November 8, 1937, this Court in its decision in the *Aronson* case (302 U. S. 16) held that jig-saw puzzles were not taxable.

On January 10, 1939, the petitioner started this action upon the refund claim disallowed on August 4, 1937 R. 1). The action was commenced within the two year period after disallowance of the claim prescribed by statute (R. S. 3226, Appendix, p. 15). The defend-

ants in their answer set up as a complete defense, the filing and disallowance of the claim for refund, disallowed August 13, 1935, and the fact that this action was commenced more than two years after that date (R. 10-12). The District Court for the Eastern District of New York gave judgment for the petitioner (R. 92-93). The Circuit Court of Appeals, Second Circuit, reversed, and ordered the complaint dismissed on the defense of the statute of limitations.

THE FIRST GROUND.

The decision of the Circuit Court, Second Circuit, in this case is in direct conflict with the decision of the Circuit Court, First Circuit, in *Pacific Mills* v. *Nichols*, 72 F. (2d) 103.

Pacific Mills involved facts remarkable by their similarity to the present case. There, the taxpayer filed a claim for refund alleging seven separate grounds. The claim was disallowed. Subsequently, within the time prescribed by statute for the filing of claims it filed another claim which reasserted the sixth item in the first claim. After the second claim was rejected, the taxpayer commenced an action upon the second claim. The suit was timely as to that second claim, but not as to the first claim. The District Court dismissed the action as barred by the statute of limitations. The Circuit Court, First Circuit, reversed, and held that the taxpayer's action based upon the second claim was proper.

The Circuit Court, Second Circuit, in the case at bar, assumed that both claims were filed on the same ground, a contention which the petitioner does not

admit, and based its decision on that theory. Then it attempted to distinguish the facts in *Pacific Mills* but admitted the possibility of identity of fact.

> "The plaintiff relies on *Pacific Mills* v. *Nichols*, 1 Cir., 72 F. 2d 103. In that case the court took the view that the second claim for refund raised different grounds and so was not a mere repetition of the first claim. On such a basis the *Pacific Mills* case is different from the present one. If it stands for more than this, we cannot follow it." *Einson-Freeman* v. *Corwin*, 112 F. 2d 683, 4.

The distinction between the two cases attempted to be drawn grows out of a possible misapprehension of the language of the opinion in *Pacific Mills*. At page 105 of the opinion in that case the court clearly states:

> "the plaintiff filed another claim for refund, the one now relied on, which was in effect a reassertion of the sixth item in its original claim."

At page 107, in distinguishing *Pacific Mills* from another case, *B. Altman* v. *United States* (Ct. Cl.) 40 F. 2d 781, the Circuit Court, First Circuit states:

> "in the *Altman* Case the ground on which the second claim was based was identical with that of the first claim and had been considered and decided in connection therewith. In the present case, as above stated, that appears not to have been the fact."

The opinion makes it plain that the second claim was a reassertion of part of the first claim, and then merely points out that the two claims were not *identical*.

An examination of the record in *Pacific Mills* bears this out. The first claim for refund will be found at page 15 and the second claim at page 79 of that record. The sixth item in the first claim reads:

> "The cost of goods sold was greater than the amount stated on the return. In particular the Corporation contends that the market price of cottom [*sic.*] and wool fixed by the Department as of December 31, 1918 was greater than the actual market price."

The pertinent part of the second claim reads:

> "Taxpayer contends that its closing inventory of wool for the year 1918 should be valued at British Issue Prices rather than at the figures fixed by the Department. If this were done, the reduction of inventory and income for the year 1918 would result in a reduction of tax considerably larger than $425,446.72, which is the amount of additional tax paid for the year 1918 on April 4, 1923, or less than four years prior to the filing of this claim for refund."

In other words both claims made the same contention: that the closing inventory for 1918 had been overvalued, that a correction of this overvaluation would result in an increase in cost of goods sold. The inevitable result of such an adjustment would be a reduction in net income.

The second claim in *Pacific Mills* was a reassertion of part of the first claim. Assuming, as the Circuit Court here does, that the second claim in this case was filed on "one of the grounds asserted in the first", the two cases are identical on the facts. The difference in the conclusion reached by the Courts in the two Circuits, therefore, calls for a review of this case by this Court to resolve this difference.

THE SECOND GROUND.

This case involves an important question of federal law which has not, but should be, decided by this Court.

The statute pertaining to the filing of claims for refund (R. S. §3228, as amended, 26 U. S. C. A. 1433; I. R. C. §3313, Appendix, p. 16) contains no limitation as to the number of refund claims which a taxpayer may file, nor does any other statute. The statute pertaining to the filing of suit upon disallowed claims (R. S. 3226, as amended, 26 U. S. C. A. 1672-1673, I. R. C. §3772, Appendix, p. 15) as it applies here, provides that no suit shall be maintained until a claim for refund or credit has been filed; that suit shall not be commenced before the expiration of six months after filing, unless the Commissioner prior thereto renders a decision on the claim, nor after the expiration of two years after disallowance, and makes provision for the effect of action by the Commissioner after disallowance.

Despite the silence of Congress on the point, the Bureau of Internal Revenue and the Courts have sought to limit the number of claims which a taxpayer may file. In *B. Altman & Co.* v. *U. S.*, 40 F. 2d 781, certiorari denied, 282 U. S. 863, the Court of Claims, and in the case at bar the Circuit Court, Second Circuit, held a second refund claim ineffectual. In *Pacific Mills* v. *Nichols*, 72 F. 2d 103, the Circuit Court, First Circuit, and in *Untermeyer* v. *Bowers*, 79 F. 2d 9, cert. den. 296 U. S. 641, the Circuit Court, Second Circuit, held a second claim effectual.

To add to the confusion, the Bureau of Internal Revenue, in a Solicitor's law opinion (L. O. 1116, Internal Revenue Bulletin, C. B. III-1, p. 350, set forth in part in Appendix, p. 17) states that the lan-

guage of R. S. §3228 (Appendix, p. 16) permits the filing of separate claims for refund of a single tax, so long as all claims are filed within the period prescribed for the filing thereof. Furthermore, in the administration of the statute, the Bureau raised no objection to the second claim. A reference to the copy of the second claim in the record (Pltff.'s Ex. "4" in Evidence, R. 53; Offered in Evidence, R. 36) shows that the second claim was received by the Collector (the receipt stamp); that it was numbered in regular course (see the number "ST 50075" on second page), that it was marked to show that a previous claim was filed (see the legend "Previous Claim See Cl. No. R22127" on second page); and that it was acted upon (see recommendation for rejection, and initials indicating examination and approval of claim, on the second page). Then the petitioner was given notice of disallowance, not however, because the claim was a duplication of a previous claim, but because the "test" case had not yet been decided by this Court (Pltff.'s Ex. "6" in Evidence, R. 56; Offered in Evidence, R. 39).

No argument need be made for the proposition that a definite decision upon the rights of taxpayers in revenue cases, and especially in refund cases, is important, both to the public and to the Government. While a statute of limitations performs a useful function in outlawing stale claims, the result of the operation of the statute deprives taxpayers of their rights. It is therefore extremely important that the law on this question be settled.

The rulings and practice in the Bureau of Internal Revenue, and the absence of a prohibition in the applicable statutes on the one hand, opposed to certain Court decisions on the other, point to the need for a decision of this Court to settle a question which has never thus far been considered by it.

THE THIRD GROUND.

The petitioner contends that the Circuit Court failed properly to consider the question for two reasons.

(a)

The Circuit Court based its opinion, in part at least upon so much of R. S. 3226, as amended, 26 U. S. C. A., Int. Rev. Code, §3772 (Appendix, p. 15), as reads:

> "consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun."

This part of R. S. 3226 has no application to this case. This action is based upon the refund claim filed on February 4, 1937, and rejected August 4, 1937 (R. 6). The action was begun January 10, 1939, within the two year period prescribed by statute for filing suit on that claim. The claim was not, nor was it intended by the taxpayer, or considered by the Commissioner, as an application to consider, reconsider or take any action upon the first claim. Yet the Circuit Court treats the second claim as if it were an application to reconsider the first.

(b)

The Circuit Court ignored completely the findings of fact of the District Court on the question of whether the two claims for refund were different

claims. In its findings of fact (R. 80, 81, 84) the District Court found:

> "11. That the said claim for refund filed on the 15th day of January, 1935 was filed upon the theory that jig-saw puzzles manufactured by plaintiff were children's games.
>
> "12. That the claim for refund filed on the 4th day of February, 1937 was filed upon the theory that jig-saw puzzles manufactured by plaintiff were not games; that said puzzles were contrivances for testing ingenuity or skill, and upon the basis of the decision of the United States Circuit Court of Appeals for the First Circuit in the case of *Philip J. Aronson, Trustee, plaintiff-appellant* v. *Thomas W. White, appellee* (No. 3171), decided January 5, 1937."

Under the Federal Rules of Procedure, Rule 52 (Appendix, p. 18), findings of fact shall not be set aside unless clearly erroneous. The Circuit Court, by its very statement of the question in the case in the first paragraph of its opinion not only overlooks the findings, but ignores without explanation the contention of the petitioner that the first and second claims were filed upon different grounds. As the District Court pointed out in its opinion (R. 71, 72), the second claim was based upon the decision of the Circuit Court of Appeals in *Aronson* v. *White*, 87 F. 2d 272, aff'd 302 U. S. 16, a basis not set forth in the first claim. The second claim, furthermore, was disallowed for the sole reason that this Court had not yet passed upon the *Aronson* case, and no other. In addition, the claims differed because (1) the first claim did not state the amount claimed; the second did

(Deft.'s Ex. "A" in Evidence, R. 57; Offered in Evidence, R. 40; Pltff.'s Ex. "4" in Evidence, R. 53; Offered in Evidence, R. 36); (2) the first claim was based upon the principal contention that jig-saw puzzles were children's games, a fact not relied upon in the second claim, and (3) the second claim included an item of $67.01 of tax not claimed in the first claim (R. 61). The Circuit Court apparently completely disregarded the findings of the Court below, and the items of difference between the two claims. This is apparent from the statement of the question in the opinion of the Circuit Court (*Einson-Freeman Co.* v. *Corwin,* 112 F. 2d 683).

CONCLUSION.

Because the question here was decided differently by the Circuit Courts in two Circuits, because the question is a question involving the Internal Revenue Laws which ought to be decided and settled by this Court, and because it appears that the Circuit Court apparently departed from the accepted course of judicial proceedings, it is requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

DANIEL GORDON JUDGE,
Attorney for Petitioner.

APPENDIX.

STATUTES.

Sec. 609, Revenue Act of 1932.

TAX ON SPORTING GOODS—There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames, and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, *games and parts of games (except playing cards and children's toys and games);* and all similar articles commonly or commercially known as sporting goods. (Italics ours.)

R. S. 3226, as amended by Sec. 807, Revenue Act of 1936; 26 U. S. C. A. 1672-3; Int. Rev. Code §3772.

SUITS FOR REFUND.

(a) LIMITATIONS—(1) CLAIM. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions

of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) TIME. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun.

(b) PROTEST OR DURESS. Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

R. S. 3228, as amended; 26 U. S. C. A. 1433.

PERIOD OF LIMITATION UPON REFUNDS AND CREDITS —All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

Rulings and Regulations.

S. T. 567; Regulations 46, Article 55; Internal Revenue Bulletin XI-2 C. B. 481.

Taxability of jig-saw puzzle as a game.

Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig-saw puzzles as games.

The word "games", as used in section 609 of the Revenue Act of 1932, does not mean the games themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, T. D. 3401, C. B. 1-2, 297.) Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles or games, are of the type ordinarily designed for the use of children, they are not taxable.

A jig-saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig-saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig-saw puzzle contains more than 50 pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932.

L. O. 1116; Internal Revenue Bulletin III-1 C.B. 350, 358.

Except as modified by section 252, which has no application to the instant case, the language of section 3228, Revised Statutes, that all claims for the refunding of any tax must be presented to the Com-

missioner within four years next after payment of the tax sought to be refunded, may be construed to permit the filing of separate claims for refund of a single tax or portion thereof, so long as all the claims are filed within the four-year period of limitations. To permit the filing of additional claims setting up new grounds for refund, as amendments of an original claim, with no limit as to the time for such filing, after the original claim has been decided and after the statutory period has expired, would to a large extent nullify the intent of Congress in providing a statute of limitations for filing of claims. On the other hand, no hardship is imposed upon the taxpayer in requiring him to file new claims if he wishes to set up different grounds for refund within the four-year statutory period, for the regulations already require his claim or any amendment to be made under oath, and the most convenient method of complying with that and other requirements of the regulations is to use either the form provided by the department for that purpose or one prepared by the claimant himself sufficiently like Form 843 to comply with the regulations.

Rule 52, Federal Rules of Civil Procedure.

Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity

of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:	
Pacific Mills v. *Nichols*, 72 F. (2d) 103	4, 5
Untermyer v. *Bowers*, 79 F. (2d) 9	5
Statutes:	
Revised Statutes, Sec. 3226 as amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as further amended by Sec. 807, Revenue Act of 1936, c. 690, 49 Stat. 1648 (U. S. C., Supp. V, Title 26, Sec. 3772)	2

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 432

EINSON-FREEMAN CO., INC., PETITIONER

v.

WALTER E. CORWIN, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, AND ALMON G. RASQUIN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 68–77) is reported in 28 F. Supp. 98. The opinion of the Circuit Court of Appeals (R. 97–100) is reported in 112 F. (2d) 683.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1940 (R. 101). The petition for a writ of certiorari was filed September 14, 1940. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After its claim for refund of taxes has been rejected, may the taxpayer enlarge the time for commencement of suit to recover those taxes by filing a second claim for refund upon a ground asserted in the prior claim?

STATUTE INVOLVED

Revised Statutes, as amended by Section 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as further amended by Section 807, Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim

unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun.

* * * * *

[U. S. C., Supp. V, Title 26, Sec. 3772.]

STATEMENT

This suit was instituted by petitioner to recover excise taxes on jig-saw puzzles which had been collected under Section 609 of the Revenue Act of 1932 imposing a manufacturers' excise tax with respect to "games". (R. 3–9.)

On January 15, 1935, the petitioner filed a claim for refund based upon two grounds: first, that jig-saw puzzles were not games; and second, if jig-saw puzzles were games, they were children's games and so specifically exempt from tax. (Ex. A, R. 57.) This claim was rejected August 13, 1935. (Ex. B, R. 58.)

On February 4, 1937, the petitioner filed a second claim for refund upon the sole ground that jig-saw puzzles were not games. (Ex. 4, R. 53.) This claim was rejected on August 4, 1937. (Ex. 6, R. 56.)

On January 10, 1939, suit was commenced (R. 2) and, after trial, the District Court overruled the respondents' plea that the suit was not timely because brought more than two years after rejection of the first claim for refund. (R. 70–77.) The Circuit Court of Appeals reversed the judgment of the District Court and held that the time for commencement of suit ran from the rejection of the first claim for refund (August 13, 1935), and since this suit was brought more than two years thereafter it was barred.

ARGUMENT

1. Petitioner's primary reason for the issuance of the writ is an asserted conflict with *Pacific Mills* v. *Nichols,* 72 F. (2d) 103 (C. C. A. 1st). In that case one of the grounds alleged in the claim for refund was that the cost of goods sold was greater than the amount stated in the return and that the market price of cotton and wool fixed by the Bureau of Internal Revenue as of December 31, 1918, was greater than the actual market price. That claim was rejected and a second claim was filed based on the contention that the taxpayer's closing inventory of wool for the year 1918 should be valued at the British Issue Prices rather than at the figures fixed by the Bureau of Internal Revenue.

The court below distinguished the *Pacific Mills* case by pointing out (R. 99) that there the claims for refund were based upon different grounds and the second claim was not a mere repetition of the first. The same distinction had previously been

recognized by the court in *Untermyer* v. *Bowers,* 79 F. (2d) 9 (C. C. A. 2d), where it was said (pp. 10–11):

> The Court of Claims held in *B. Altman & Co.* v. *U. S.,* 40 F. (2d) 781, that after rejection the taxpayer might not so extend his time by another claim, in a case where the grounds of both claims were the same, and where there was therefore no excuse for the second. In *Pacific Mills* v. *Nichols* (C. C. A.) 72 F. (2d) 103, the First Circuit added a gloss that the taxpayer might within the period of limitation file a new claim based upon new grounds; and this distinction the Court of Claims had itself recognized in *Hills* v. *U. S.,* 50 F. (2d) 302, 303. * * *

But even if it be assumed, as the petitioner contends, that the claims involved in the *Pacific Mills* case were identical, that decision is not in conflict with the decision in this case because the real basis of that decision was that the Commissioner, by considering the second claim, reopened the claim first filed and the statute began to run on the date of final rejection. *Pacific Mills* v. *Nichols, supra,* p. 107. The consideration and rejection of the second claim in this case could not effect a reopening of the original claim since Section 3226 of the Revised Statutes, as amended by Section 807, Revenue Act of 1936 c. 690, 49 Stat. 1648 (U. S. C. Supp. V, Title 26, Sec. 3772), here applicable, specifically provides—

> consideration, reconsideration, or action by the Commissioner with respect to such claim

following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun.

2. The petitioner contends that the court below ignored the findings of fact of the District Court that the two claims for refund were based upon different grounds. The claims themselves were the only evidence upon this question. (Ex. A, R. 57 and Ex. 4, R. 53.) As the ground that jig-saw puzzles were not games is plainly asserted in each claim and considered by the Commissioner in his rejection of each claim (Ex. B, R. 58 and Ex. 6, R. 56) there was no evidence to sustain the findings of the District Court and the Circuit Court of Appeals properly set them aside.

CONCLUSION

The decision of the court below is correct. There is no conflict with other decisions, and no question of general importance is presented. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

OCTOBER, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940